IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 231

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, AFL-CIO,

Petitioner,

v.

ARIADNE SHIPPING COMPANY, LIMITED, a Liberian corporation, and EVANGELINE STEAMSHIP COMPANY, S. A., a Panamanian corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

REPLY BRIEF FOR PETITIONER

LOUIS WALDMAN
SEYMOUR M. WALDMAN
MARTIN MARKSON
501 Fifth Avenue
New York, N. Y. 10017

SEYMOUR A. GOPMAN
1 Lincoln Road Bldg.
Miami Beach, Fla. 33139

Attorneys for Petitioner

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I.

Respondents' Unfounded Excursions Beyond the Record

Much of respondents' Statement of the Case is totally unsupported by the record. Inasmuch as the critical evidence consists of the relatively brief testimony of but a single witness, these departures from the record are readily apparent:

1. Respondents assert that the SS Ariadne carried no cargo whatsoever, that all the work involved in loading

and unloading ship's stores and passengers' baggage was performed by the ship's crew, and that no American residents were hired "to do longshore work in American ports" (Br. 2-4).[1] The only evidence in the record squarely contradicts these claims.

The sole witness in this case testified flatly that the "type of work" which the pickets sought to publicize consisted of "Loading of the ship, stowage and loading of automobiles, loading cargo and ship stowage." He further testified that such work was in fact performed both by "employees of the ship" and "by outside labor" (A. 44a-45a). This evidence stands uncontradicted. Neither through cross-examination nor other means did respondents' counsel seek to challenge it. There is no state court finding to support respondents' present unsubstantiated claim, and the opinion of the District Court of Appeal described the picketing as a publicization of the payment of substandard wages for work by American residents (A. 52a).

Respondents rely on testimony given in another case, before another judge, concerning another company, and involving other issues (Br. 3). That testimony apparently related to work performed by the witness' employer, Eastern Steamship Lines, Inc. There is no indication that any representative of respondents testified as to the operations carried on by respondents or by contractors other than Eastern Steamship Lines, Inc. Nor is there any indication in this record that the trial judge herein relied on anything occurring in the *Eastern Steamship Lines* case or that the testimony in that case was even called to his attention. Totally unfounded, therefore, is the assertion (Br. 4) that the "true facts" were pointed out by the record herein to the Florida courts.

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[1] Numbers in parenthesis preceded by the letters "Br." refer to page numbers in respondents' brief.

2. Respondents aver that the members of the Ariadne's crew are "covered by Ship's Articles of Liberia" and "pursuant to these Articles, and as a part of their employment," they are "required to load and unload" ship's stores and baggage (Br. 2, 12-13).

Respondents' complaint, unsubstantiated by any evidence, does allege that the crew is governed by Liberian Ship's Articles (A. 5a). But there is neither allegation nor proof as to the terms or scope of those Articles. There is nothing whatsoever to warrant the assertion that loading and unloading ship's stores and baggage was "pursuant to" or "required" by these Articles.

3. The record fails to establish mootness as to the owner of the SS Bahama Star (Br. 2). Neither the circumstances nor the bona fides of the alleged transfer of ownership have been judicially explored or considered. Moreover, both respondents were required to furnish a surety bond (A. 17a, 46a, 54a). In the event of reversal by this Court, petitioner is entitled to pursue its remedies against that bond. *Liner* v. *Jafco, Inc.*, 375 U.S. 301.

4. Respondents claim that the Union first picketed Eastern Steamship Lines with safety signs, then, when that was enjoined, used the same safety signs with a mere change of name to "Ariadne", and only after this proved futile, shifted the message on its signs to "wages" (Br. 9). Their contention appears to be that the area standards picketing was a "mere pretext" and the Union's true objective was to force the assignment of the baggage and ship's stores work to ILA members (Br. 9).

Were this so, it would only serve to confirm the NLRB's preemptive jurisdiction, for it would posit a classic Section 8(b)(4) violation. The contention, however, is not only totally unsupported by anything in the record, the actual

sequence of events is demonstrably different from that stated in respondents' brief.

The evidence in this record indicates that the area standards picketing of these respondents commenced at least as early as the safety picketing (A. 44a-45a). And since respondents find the *Eastern Steamship Lines* case so illuminating, it is not amiss to note that the record in that case establishes that area standards picketing was directed at the longshore operations of the SS Ariadne and SS Bahama Star before there was any picketing of any kind against the two corporate respondents herein.

Petitioner first picketed Eastern Steamship Lines in May 1966, in the belief that Eastern was responsible for all longshore work relating to the two vessels. Eastern sought a temporary restraining order, and a hearing was held on May 20, 1966. At that hearing, Eastern took the position that it was the wrong party and that petitioner's grievance was against the foreign steamship lines. In the course of that hearing, Eastern's counsel (as respondents' brief notes (Br. 3), the same counsel representing respondents throughout the present litigation) described the picketing as follows:

> "Mr. Leslie: . . . This is the wrong person that is walking up and down in front of Eastern's place of business and saying Eastern maintains substandard wages and Eastern has defective and unsafe ships. That is what they are saying." [2]

The complaint in the case at bar alleges that picketing of respondents did not begin until May 23, 1966 (A. 4a), three days after the court hearing in *Eastern Steamship*

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[2] *Eastern Steamship Lines, Inc.* v. *International Longshoremen's Assocation, Local 1416,* Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, No. 66C-5298; transcript of hearing of May 20, 1966, p. 8.

Lines and after petitioner had been advised that respondents, not Eastern, were responsible for the longshore work on the two vessels and for the wage rates applicable to such work.

The sequence of events is thus clear and quite different from that asserted in respondents' brief. Petitioner publicized the failure to observe area wage standards for longshore work on the SS Ariadne and SS Bahama Star from the moment its picketing began, first against Eastern Steamship Lines and then against respondents. The claim of afterthought is not only unfounded on this record, it is factually untrue.

5. It is somewhat strange, to say the least, to find respondents seeking to derive advantage from an alleged failure by the Union to present additional evidence of the economic conditions underlying the labor dispute, between the grant of the temporary injunction and the grant of the permanent injunction (Br. 4, 17). There was no trial evidence by either party simply because respondents moved for and obtained summary judgment. The Union unsuccessfully opposed this motion (A. 47a), on the ground that the factual issues merited full evidentiary development. The fact that petitioner was denied any subsequent opportunity to amplify the evidence introduced at the hastily scheduled hearing on the application for a temporary restraining order can hardly support an inaccurate contention that it never sought to submit such evidence.

The procedural history of this case only serves to emphasize the importance of upholding the preemptive jurisdiction of the NLRB. In the National Labor Relations Act, Congress has established a carefully drawn series of procedural safeguards embodying assurances of adequate notice, hearing, compulsory attendance of witnesses, find-

ings and similar staple protections. Preliminary injunctive relief may be sought only by the Board, not by any private party, and must be followed by a Board hearing on the complaint. The ultimate disposition of the proceeding is determined by the evidence in the record before the Board and not on the typically inadequate record on the hearing for interim relief. NLRA, Sections 10 and 11, 29 U.S.C. §§ 160 and 161.

Sharply contrasting are the procedures of the Florida courts in this case. With only a minimal hearing following immediately upon service of the complaint, with no evidence at all on the part of plaintiff, with no trial, and with no judicial findings at any stage of the proceedings, a permanent injunction has issued forbidding any picketing which publicizes respondents' payment of substandard wages for longshore work. To permit such a result is to frustrate and defeat not only the substantive rules of federal law, but its vital procedural features as well.

6. Respondents erroneously assert that the Union has admitted the correctness of the injunctive provisions against the "safety" signs as well as the trial court's jurisdiction over this aspect of the controversy (Br. 6). That is not so. For reasons unrelated to the state court's jurisdiction or the correctness of its order, the Union expressly abandoned its appeal from that portion of the injunction in the course of the state proceedings; and, therefore, the point was not preserved for federal review.

II.

Respondents' Misconceptions as to the Scope of the National Labor Relations Act and the Jurisdiction of the NLRB

Although respondents' brief is replete with factual misstatements wholly unsupported by the record, even on respondents' version of the case state courts are without jurisdiction over this controversy.

For respondents admit that ship's stores and passengers' baggage are regularly loaded and unloaded aboard the SS Ariadne in Florida ports. They admit their own responsibility for these operations. And they do not challenge the truthfulness of the message contained on the picket signs, that the wage rates for this work fall below those prevailing in the area. This is more than sufficient to establish the NLRB's preemptive jurisdiction.

Respondents' suggestion, unsupported by any authority, that loading and unloading baggage and ship's stores does not constitute longshore work is both misplaced and erroneous. Not only is this an issue to be decided under federal law through the exclusive decisional competence of the NLRB, it is an issue which the NLRB has already considered and decided, adversely to respondents' contention. Thus, for example, the unit description in the Board's certification of the longshore unit for the Port of New York specifies

> "All longshore employees engaged in work pertaining to the . . . loading and unloading of cargoes, including mail, ship's stores and baggage. . . ." [3]

[3] *New York Shipping Association, Inc.*, 116 NLRB 1183, 1188. As noted at page 28 of our principal brief, the employers covered by this certification include the major foreign flag steamship lines.

Similarly, in *International Longshoremen's and Warehousemen's Union, Local 13 (Princess Cruises Co.)*, 161 NLRB 451, the Board assumed Section 10(k) jurisdiction over a dispute concerning the assignment of work "involved in the handling of the baggage of passengers embarking on or debarking from the vessel" a foreign cruise ship (161 NLRB at 453). The Board awarded the work to longshoremen hired by the foreign steamship company, on the basis of established industry practice under which baggage handling traditionally fell within the scope of longshore work.

Apparently recognizing the futility of their conclusory assertion that no longshore work was performed on their vessels, respondents argue that all longshore work, as well as any other operation "essential to enable . . . [the vessel] to accomplish its purpose on navigable waters" is embraced by the concept of "maritime operations", as used by this Court in its *Benz-McCulloch-Incres* decisions (Br. 12). This argument would, of course, also exclude from NLRB jurisdiction the full range of ship repair work, even if performed exclusively in American drydocks.

Respondents' contention has been answered in our principal brief. Here it is sufficient to note simply that their argument is not only unsupported by authority, it is totally at war with industrial reality throughout the world. The task of loading and unloading cargoes, including ship's stores and baggage, is functionally distinct from manning or operating the ship. And these two types of work are traditionally and regularly performed by different trades or groups of workers the world over. The longshoreman or dockworker is separate and distinct from the seaman, whether the port be New York, London, Rotterdam, Venice, Haifa, Leningrad or Buenos Aires.

In the United States this industrial dichotomy is manifested by NLRB decisions such as those cited above and the collective bargaining agreements which they reflect and mandate. In other nations it is evidenced by such international enactments as the Protection against Accidents (Dockers) Convention, which has been adopted by leading maritime powers and which expressly covers workers engaged in "all or any part of the work performed on shore or on board ship of loading or unloading any ship. . . ." [4]

It is because of this well-recognized distinction between maritime operations and longshore operations—and the personnel who perform each—that respondents are unable to cite any foreign labor relations laws, Liberian or otherwise, which would purport to regulate longshore work conducted exclusively in ports of other nations. And that is why in this area there is not the conflict with foreign laws and foreign regulations which the Court perceived in the seagoing maritime field.

Even if respondents' American longshore work were covered by the crew's Ship's Articles, a proposition unsubstantiated by the record, respondents' position would not be advanced. The fact that work performed exclusively in American territories may be covered by a private, self-serving agreement is a far cry from establishing conflict with foreign laws. A foreign shipping company and its crew cannot combine to insulate shore-based work in the United States from American regulatory legislation. Respondents, on their own unproven version of the facts, are no different from any foreign employer using alien employees to perform work wholly within the United States. Such work, as demonstrated in our principal brief, is covered both by the

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[4] This Convention is published in *The International Labour Code, 1951* (ILO 1952), p. 451 *et seq.*

federal labor law and by other federal regulatory and social welfare enactments.

III.

Respondents' Attempt to Obfuscate the Clear Constitutional Impediment to the Injunction Granted Herein by the Florida Courts

It is difficult to analyze respondents' argument on the free speech issue because it is marked by such a welter of self-contradiction. Nowhere is this more evident than in respondents' hopelessly inconsistent effort to decide precisely what objective they wish to attribute to the Union picketing.

On the one hand, respondents proclaim that they performed no longshore work and that neither the Union nor its members held themselves out for employment on their two vessels or ever sought such employment, thus leading to the conclusion that the picketing was a "mere pretext to conceal the absence of any labor dispute" (Br. 9, 17-18). But in the very next breath, respondents urge that the purpose of the picketing was to coerce them to displace other employees from certain jobs and award this work to the Union's members (Br. 9, 18).

However, respondents cannot escape the fact that no evidence was presented to support either of these inconsistent propositions. Thus they are reduced to claiming that the judge "chose to believe the verified complaint", notwithstanding the denials in the verified answer (A 18a-21a) and the total failure of proof, and that the trial court somehow "recognized" petitioner's purpose (Br. 18). But a trial judge's speculation cannot cure a total absence of proof (Cf. *Thompson* v. *Louisville,* 362 U.S. 199), particularly when the issue is squarely drawn not only in the

pleadings but by the flat denials of Union counsel at the only hearing held in the cause (A. 39a).

Respondents also argue that the Union failed to give adequate notice of its grievance and reasonable opportunity to negotiate whatever differences might exist between the parties, citing the decisions in *Fountainebleau Hotel Corp.* v. *Hotel Employees Union,* 92 So. 2d 415 and *Sax Enterprises* v. *Hotel Employees Union,* 80 So. 2d 602, both of which were reversed, on preemption grounds, by this Court (*sub nom. Hotel Employees Union* v. *Sax Enterprises,* 358 U.S. 270).[5] Nowhere in the instant case does any state court suggest, let alone hold, that failure to give notice or negotiating opportunity was the infirmity in the Union's picketing or the reason for denying petitioner the protection of the First Amendment. And, of course, there is not the slightest evidence to support any such contention. Moreover, had the claim been advanced below and invoked by any state court, it would have been subject to serious challenge, factually, legally and constitutionally. In the posture of the case from its inception, no such opportunity was afforded petitioner.

1. As a factual matter, respondents did receive actual advance notice of the Union's position, through the area standards picketing against Eastern Steamship Lines which preceded by many days the picketing of respondents (see pp. 4-5, *supra*). Indeed, at the hearing in the *Eastern*

[5] The other two Florida decisions, cited at page 17 of respondents' brief, deal with picketing designed to achieve a change in the racial proportions of the employer's work force. These injunctions, justified by the Florida courts on the authority of *Hughes* v. *Superior Court,* 339 U.S. 460, rest on an "unlawful objective" unrelated to anything in the case at bar. Moreover, this Court vacated the judgment in *NAACP* v. *Webb's City, Inc.,* 152 So. 2d 179, on plaintiff's representation that the injunction would be set aside by the trial court. 376 U.S. 190.

case, Union counsel announced, on the record, the Union's intention to picket respondents for failure to meet area wage standards.[6] There is no indication that respondents made any effort to satisfy this protest or even to discuss it with representatives of the Union.

2. As a matter of state law, the applicability of the proposition invoked by respondents is highly questionable. Where the picketing is organizational or seeks recognition of the union and the commencement of bargaining relations (as in *Fountainebleau* and *Sax*), then the opportunity for negotiations may have some meaning. But here the Union did not claim to represent respondents' employees or seek recognition as bargaining representative. Under the circumstances, it is difficult to see that the "opportunity to negotiate . . . differences" (Br. 16) has any significance or applicability.

3. As a matter of federal Constitutional law, the precondition to picketing relied upon by respondents is of dubious validity, to say the least. Apparently based on considerations of "decency", it would require a "fair" and "reasonable" opportunity to negotiate before picketing could commence. Such a vague, nebulous standard, unrelated to any unlawful objective or to any means (such as violence) traditionally subject to state control, hardly satisfies the type of precise, narrowly drawn rule which this Court requires where a species of free speech is sought to be abridged. *Thornhill* v. *Alabama*, 310 U.S. 88; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Edwards* v. *South Carolina*, 372 U.S. 229; *Cox* v. *Louisiana*, 379 U.S. 536; *Gregory* v. *Chicago*, 394 U.S. 111.

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[6] See footnote 2, *supra*, transcript of May 20, 1966 hearing, pp. 16-17.

But we revert to the basic premise: totally lacking is either proof or judicial invocation in this case of the theory now relied upon by respondents. Thus even were the alleged state requirement to be deemed valid and applicable to this area standards picketing, there is no reason to assume that this was in fact the basis for the decision of the Florida courts or whether, to the contrary, the state courts relied upon some other impermissible theory. In such a posture, a judgment abridging a form of expression may not stand. *Gregory* v. *Chicago, supra; Stromberg* v. *California,* 283 U.S. 88.

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Respectfully submitted,

LOUIS WALDMAN
SEYMOUR M. WALDMAN
MARTIN MARKSON
501 Fifth Avenue
New York, N. Y. 10017

SEYMOUR A. GOPMAN
1 Lincoln Road Bldg.
Miami Beach, Fla 33139

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 231.—October Term, 1969

International Longshoremen's Local 1416, AFL–CIO, Petitioner, *v.* Ariadne Shipping Company, Limited, et al.	On Writ of Certiorari to the District Court of Appeal of Florida, Third District.

[March 9, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

The question presented here is whether the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, pre-empts state jurisdiction to enjoin peaceful picketing protesting substandard wages paid by foreign-flag vessels to American longshoremen working in American ports. The Florida courts held that there was no pre-emption, citing *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963), and *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U. S. 24 (1963). We granted certiorari. 395 U. S. 814 (1969). We reverse.

In 1966 the respondents, a Liberian corporation and a Panamanian corporation, operated cruise ships to the Caribbean from Port Everglades and Miami, Florida. Respondent Ariadne Shipping Company operated the *S. S. Ariadne*, of Liberian registry, with a crew subject to Liberian ship's articles. Respondent Evangeline Steamship Company operated *S. S. Bahama Star*, of Panamanian registry, with a crew subject to Panamanian ship's articles. The uncontradicted evidence showed that "[l]oading of the ships, stowage and loading

of automobiles, loading cargo and ship stowage" occurred whenever either vessel berthed at Port Everglades or Miami, "[p]art of it [performed] by employees of the ship and some of it by outside labor." The petitioner is a labor organization representing longshoremen in the Miami area. Although none of those doing the longshore work for the ships belonged to the union, whenever either vessel docked at Port Everglades or Miami in May 1966, petitioner stationed a picket near the vessel to patrol with a placard protesting that the longshore work was being done under substandard wage conditions.[1] Respondents obtained temporary injunctive relief against the picketing from the Circuit Court of Dade County.[2] That court rejected petitioner's contention that the subject matter was pre-empted, holding that under *McCulloch* the picketing was beyond the reach of the regulatory power of the National Labor Relations Board, and hence

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[1] A picket was also stationed in front of the terminal through which passengers embarked and disembarked. This picket carried a sign alleging that the ships were unsafe and passed out handbills to the same effect.

[2] The injunctive order was in four paragraphs. Paragraphs 1 and 2 prohibited picketing with signs, or distributing handbills stating, alleging or inferring that the vessels were unsafe. The petitioner abandoned its appeal from these provisions and they are not before us. Paragraph 4 was set aside on appeal. See n. 4, *infra*. Paragraph 3 therefore is the only provision under review in this Court. It prohibits petitioner from

"Picketing or patrolling with signs or placards indicating or inferring that a labor dispute exists between [respondents] and [petitioner], by any statement, legend or language alleging [respondents] pay their employees substandard wages."

Initially petitioner directed the picketing not at respondents' ships but at Eastern Steamship Lines, Inc., a Florida corporation which acted as respondents' general agent. Eastern obtained an injunction, 211 So. 2d 858 (1968), whereupon petitioner shifted the picketing to the ships themselves.

could be enjoined, since it violated Florida law. The temporary injunction was affirmed by the District Court of Appeal for the Third District of Florida in a brief *per curiam* order citing *McCulloch* and *Incres.* 195 So. 2d 238 (1967). Thereafter the Circuit Court, without further hearing, made the injunction permanent. The District Court of Appeal again affirmed, although noting that the testimony "tended to show" that the picketing was carried on to protest against the substandard wages paid for the longshore work. 215 So. 2d 51, 53 (1968).[3] The Supreme Court of Florida denied review in an unreported order.

McCulloch and *Incres* construed the National Labor Relations Act to preclude Board jurisdiction over labor disputes concerning certain maritime operations of foreign-flag vessels. Specifically, *Incres,* 372 U. S., at 27, held that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2 (6) [of the Act]." See also *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957). This construction of the statute, however, was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel, an intervention thought likely to "raise considerable disturbance not only in the field of maritime law but in our international relations as well." *McCulloch,* 372 U. S., at 19.

In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favor-

[3] The Court of Appeal set aside paragraph 4 of the injunction which prohibited "By any manner or by any means, including picketing or the distribution of handbills, inducing or attempting to induce customers and potential customers of [respondents] to cease doing business with [respondents]." 215 So. 2d, at 52, n. 1.